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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

IN RE FACEBOOK, INC. SHAREHOLDER DERIVATIVE PRIVACY LITIGATION

This Document Relates To:

ALL ACTIONS

LEAD CASE NO. 4:18-CV-01792-HSG

ASSOCIATED CASES: NOS. 4:18-CV-01834-HSG, 4:18-CV-01893-HSG, 4:18-CV-01929-HSG, 4:18-CV-02011-HSG

**FACEBOOK, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR PERMANENT INJUNCTION OF STATE PROCEEDINGS**

**Hearing:**

| | |
|---|---|
| Date: | January 9, 2020 |
| Time: | 2:00 p.m. |
| Location: | Courtroom 2, 4th Floor |
| Judge: | Hon. Haywood S. Gilliam, Jr. |

Date First Action Filed: March 22, 2018

Facebook respectfully submits this reply memorandum in response to the state court plaintiff John O'Connor's Opposition, ECF No. 132 ("Opp."), and the federal court Plaintiffs' Response, ECF No. 131 ("Response"), to Facebook's Motion for Permanent Injunction of State Proceedings, ECF No. 124 ("OB").

## I. PRELIMINARY STATEMENT

This Court should exercise its broad discretion under the relitigation exception of the Anti-Injunction Act and prevent O'Connor from relitigating this Court's ruling that Facebook's Exclusive Forum Provision covers California Corporations Code claims brought derivatively. Facebook demonstrated in its opening brief that all of the requirements for an injunction are present here because (1) O'Connor's assertion of California Corporations Code claims derivatively on behalf of Facebook raises the same issue decided by this Court (OB at 5-6), (2) this Court's order dismissing Plaintiffs' state law claims on *forum non conveniens* grounds is a "final judgment on the merits" with respect to that issue (*id.* at 6-7), and (3) O'Connor, as a stockholder seeking to litigate *Facebook's* state law claims derivatively on behalf of Facebook, is in privity with the Plaintiffs in this action (*id.* at 7). Thus, this Court has the power under the All Writs Act to prevent O'Connor, in concert with the Plaintiffs, from circumventing this Court's Dismissal Order (ECF No. 113) by improperly litigating the identical issue in San Mateo County in the hopes of obtaining a different decision. *Id.* at 7-8.

In response, O'Connor and Plaintiffs join forces,[1] asserting four baseless arguments in a futile attempt to overcome the obvious conclusion that O'Connor is seeking a do-over of this Court's Dismissal Order. First, O'Connor claims the issue in the State Court Action is somehow different because California applies a different legal standard than federal courts with respect to enforcement of forum selection clauses. But the California Supreme Court *expressly adopted the federal standard* in cases applying forum selection clauses, and California courts continue to rely on the federal standard when applying California law.

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[1] Plaintiffs vociferously oppose Facebook's Motion even though they admit that "Facebook's Motion does not affect Plaintiffs' claims." Response at 1. This makes clear what has been obvious from the start: that Plaintiffs are working in coordination with O'Connor to evade this Court's ruling enforcing Facebook's Exclusive Forum Provision. *See* OB at 3 n.1. Indeed, when asked to confirm their involvement in the State Court Action, Plaintiffs' counsel *refused* to respond. *See* Declaration of Brian M. Lutz in Support of Facebook's Reply ¶ 2 & Ex. 2. This silence speaks volumes.

Second, O'Connor and Plaintiffs incorrectly assert that the issue in O'Connor's state court case is different because O'Connor challenges both the validity and enforceability of the Exclusive Forum Provision, whereas this Court supposedly ruled only on its enforceability. This hair-splitting argument ignores this Court's Dismissal Order that the "forum selection provision is nonetheless ***still valid***." Dismissal Order at 10-11 (emphasis added).

Third, in the face of the Ninth Circuit's holding that "an order dismissing an action to enforce a forum selection clause is … a collaterally final order," *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 851 (9th Cir. 1997), O'Connor argues that *Offshore* does not apply because the Dismissal Order dismissed fewer than all claims pursuant to the Exclusive Forum Provision. O'Connor provides no support for that argument and ignores that finality for purposes of issue preclusion is not the same as finality for purposes of pursing an appeal. For issue preclusion, the Court's ruling need only be "sufficiently firm." *See Luben Indus., Inc. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983). The Court's dismissal of the State Law Claims "without leave to amend" easily meets this standard. Dismissal Order at 12.

Finally, while O'Connor does not and cannot challenge that he is in privity with Plaintiffs as to his derivative California Corporations Code claims, O'Connor argues that his declaratory relief claim challenging the Exclusive Forum Provision in his individual capacity somehow destroys privity. But the whole point of O'Connor's challenge to the Exclusive Forum Provision is to allow O'Connor to proceed to litigate claims derivatively on Facebook's behalf. The Court should reject O'Connor's nonsensical form over substance argument that ignores the obvious privity between O'Connor and Plaintiffs, who each have tried to do the same thing: plead around Facebook's Exclusive Forum Provision.

This Court already has ordered that Plaintiffs are not entitled to circumvent this Court's discovery orders by bringing parallel proceedings in California state courts. Plaintiffs should not be permitted to achieve the same goal through multiple derivative actions. The State Court Action is a wasteful relitigation of this Court's Dismissal Order and an improper attempt to forum shop. This Court should exercise its authority under the All Writs Act to enjoin the State Court Action from proceeding any further.

## II. ARGUMENT

### A. O'Connor Seeks To Relitigate The Same Issue Decided By This Court.

Seeking to avoid the commonsense conclusion that the issue presented in the State Court Action is the same issue already ruled upon by this Court, O'Connor argues that issue preclusion does not apply because (1) California courts apply a different legal standard than federal courts with respect to enforcing forum selection clauses (Opp. at 6-8), and (2) O'Connor challenges both the validity and enforceability of the Exclusive Forum Provision, whereas Plaintiffs only challenged its enforceability (Opp. at 8-9). Both arguments fail.

#### 1. California And Federal Courts Apply The Same Legal Standard.

The Exclusive Forum Provision issue decided by this Court is the identical issue in the State Court Action because both California and federal courts enforce forum selection provisions using the same legal standard. "Both California and federal law presume a contractual forum selection clause is valid," *Schlessinger v. Holland Am., N.V.*, 120 Cal. App. 4th 552, 558 (2004), and "both the United States Supreme Court and the California Supreme Court have placed a heavy burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case." *Lu v. Dryclean-U.S.A. of Cal., Inc.*, 11 Cal. App. 4th 1490, 1493 (1992). It is no surprise that there is a complete overlap between California and federal law because the California Supreme Court *expressly adopted* the federal standard announced by the U.S. Supreme Court in *The Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1 (1972). *See Smith, Valentino & Smith, Inc. v. Super. Ct.*, 17 Cal. 3d 491, 495 (1976). Accordingly, California courts cite *Bremen* interchangeably with California cases as articulating the standard for enforcing forum selection clauses under California law. *See Lu*, 11 Cal. App. 4th at 1493 (citing *Bremen* and *Smith*); *Berg v. MTC Elecs. Techs.*, 61 Cal. App. 4th 349, 358 (1998) (same); *Benefit Ass'n. Int'l., Inc. v. Super. Ct.*, 46 Cal. App. 4th 827, 835 (1996) (citing *Bremen*). And, in federal courts, "*Bremen* continues to provide the law for determining the validity and enforceability of a forum-selection clause." *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019). O'Connor cannot escape this Court's order by pointing to false distinctions between California and federal law regarding the enforceability of exclusive forum provisions.

O'Connor also misreads the case law. O'Connor points to language in *Atlantic Marine v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013), to suggest that federal law is different than California law. Opp. at 7.[2] But "***[m]inor variations*** in the application of what is in essence the same legal standard ***do not defeat preclusion***." *Smith v. Bayer Corp.*, 564 U.S. 299, 312 n.9 (2011) (emphasis added); *see also B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1308 (2015) (the "'issue' must be understood broadly enough 'to prevent repetitious litigation of what is essentially the same dispute'") (citation omitted).[3] The Supreme Court cases cited by O'Connor make this clear. Opp. at 6. In *Chick Kam Choo v. Exxon Corp.*, an injunction was not appropriate because the state court "would apply a ***significantly different*** … analysis." 486 U.S. 140, 149 (1988) (emphasis added). Similarly, in *Smith*, the issue was different because the West Virginia Supreme Court had explicitly "*disapproved* the approach to Rule 23(b)(3)'s predominance requirement that the Federal District Court embraced"—a fact conspicuously omitted from O'Connor's summary of the case. *See Smith*, 564 U.S. at 311 (emphasis in original); Opp. at 6. This is the exact opposite of the situation here, in which the California Supreme Court expressly adopted the federal standard, and California courts routinely rely upon that federal standard when analyzing forum selection clauses.

Finally, O'Connor's argument that California courts may employ a burden shifting analysis in connection with California Corporations Code claims (Opp. at 7-8) is a red herring. This Court already held that California's internal affairs doctrine bars plaintiffs from asserting Corporations Code claims derivatively on behalf of Facebook. Dismissal Order at 10. Accordingly, O'Connor cannot bring California Corporations Code claims derivatively, so it is irrelevant how a California court would consider a Corporations Code claim.[4] The Court should enjoin O'Connor from relitigating this Court's

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[2] *Bremen* remains the guiding legal standard regarding the enforceability of forum selection clauses notwithstanding the Court's use of different syntax in *Atlantic Marine*. *Gemini Techs.*, 931 F.3d at 914-15; *see id.* at 917 ("*Atlantic Marine* did not overrule *Bremen*"); *id.* at 914 (*Atlantic Marine* "reaffirmed *Bremen*'s core holding").

[3] O'Connor cites to *Smith, Valentino* and *Drulias v. 1st Century Bancshares, Inc.* to suggest that California courts apply a different legal standard, but *Smith, Valentino* is the California Supreme Court case that *adopted* the *Bremen* standard (*supra* at 3), and *Drulias* relies on California cases that rely on *Bremen* (*see* 30 Cal. App. 5th 696, 703 (2018) (citing *Berg* and *Smith, Valentino*)).

[4] Because O'Connor cannot bring California Corporations Code claims derivatively, his reliance on cases that shift the burden of proof when claims involve unwaivable rights under California statutes

ruling. *See Chick Kam Choo*, 486 U.S. at 150 ("Because [the district court held] that Singapore law must control petitioner's lawsuit, a decision that necessarily precludes the application of Texas law, an injunction preventing relitigation of that issue in state court is within the scope of the relitigation exception to the Anti-Injunction Act.").

**2. The State Court Action Does Not Raise Different Issues.**

O'Connor's argument that he seeks to litigate "issues that have not been litigated in this Court" (Opp. at 8) fares no better. First, O'Connor's (and Plaintiffs') argument that O'Connor asserts different derivative California Corporations Code claims than those asserted by Plaintiffs in this action is irrelevant. *See* Opp. at 9; Response at 4-5. This Court's ruling that Plaintiffs' California Corporations Code claims cannot be asserted derivatively on behalf of Facebook applies with the same force to O'Connor's claims. Second, O'Connor's and Plaintiffs' argument that the Court only decided the enforceability but not the validity of the Exclusive Forum Provision (Opp. at 8-9; Response at 5-6) is wrong. By enforcing the Exclusive Forum Provision with respect to Plaintiffs' California Corporations Code claims, the Court necessarily found that the provision is valid because courts cannot enforce an invalid agreement. *See, e.g., P and J G Enters., Inc. v. Best Western Int'l., Inc.*, 845 F. Supp. 84, 88 (N.D.N.Y. 1994) ("In order for the [forum selection] clause to be enforceable, however, it must be deemed 'valid'"). In any event, Plaintiffs raised several validity arguments in opposition to Facebook's *forum non conveniens* motion, which the Court considered and rejected. ECF No. 83. at 3, 6, 17. The Court expressly rejected Plaintiffs' argument that the Exclusive Forum Provision is invalid because Plaintiffs did not consent to the provision, holding that "the forum selection provision is nonetheless ***still valid***." Dismissal Order at 10-11 (emphasis added). The Court also rejected Plaintiffs' argument that the provision was the "product of fraud and overreaching," *id.* at 11, an argument squarely about the validity of a forum selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (holding that forum selection clause is enforceable unless party can show "that enforcement would be unreasonable or unjust, or that the clause [is] ***invalid for such reasons as fraud***

is misplaced. *See* Opp. at 7 (citing *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141 (2015) and *Wimsatt v. Beverly Hills Weight etc. Int'l, Inc.* 32 Cal. App. 4th 1511 (1995)); *see also Drulias*, 30 Cal. App. 5th at 703 (O'Connor's "[Delaware law] claims are not based on unwaivable rights created by California statutes. Accordingly, the burden is his.").

***or overreaching***") (emphasis added) (citation omitted). In light of this Court's prior ruling and the extensive briefing of this issue, it is bewildering that Plaintiffs now argue that "the parties did not brief, and the Court never addressed, the validity of the Forum Provision." Response at 4.

Regardless of what label O'Connor applies to his arguments, it is indisputable that he is trying to accomplish the same thing that the Plaintiffs tried—and failed—to do. That O'Connor suggests new arguments that Plaintiffs could have raised does not mean his action seeks to litigate a new and separate issue. "The fact that a particular argument …was not made by the [Plaintiffs] and not addressed by the district court does not mean that the issue [in question] was not decided." *Paulo v. Holder*, 669 F.3d 911, 917-18 (9th Cir. 2011); *see id.* at 918 ("If a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined."). The fact remains that this Court enforced Facebook's Exclusive Forum Provision against California Corporations Code claims, and O'Connor seeks to evade Facebook's Exclusive Forum Provision against California Corporations Code claims. This Court already decided the same issue that O'Connor seeks to relitigate in San Mateo County.

**B. The Dismissal Order Is A Final Order.**

Facebook also demonstrated that, under controlling Ninth Circuit precedent, the Dismissal Order is a final order. OB at 6-7. In *Offshore Sportswear*, the Ninth Circuit held that "an order dismissing an action to enforce a forum selection clause is … a collaterally final order under § 1291." 114 F.3d at 851. *Offshore* squarely applies to the Court's dismissal of the State Law Claims pursuant to the Exclusive Forum Provision. O'Connor's attempt to import an additional requirement that *all* claims must be dismissed pursuant to the forum selection clause for the ruling to be final (Opp. at 9-10) is inconsistent with the plain language and logic of *Offshore*. Just like in *Offshore*, Plaintiffs *are* "out of [] federal court" (*id.* at 9-10) as to their State Law Claims, which the Court "dismissed ***without leave to amend***." Dismissal Order at 12 (emphasis added). Additionally, *Offshore* explicitly rejected the same argument that O'Connor asserts here—that an order is only final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Opp. at 9 (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)). "Dismissal of an action to enforce a forum selection clause is an

appealable [final] order, even though it is not on the merits and is 'without prejudice.'" *Offshore*, 114 F.3d at 850.

Even if the Dismissal Order were somehow not final under *Offshore* (it is), the Dismissal Order still would be final for issue preclusion purposes. "A 'final judgment' for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be 'sufficiently firm' to be accorded conclusive effect." *Luben Indus.*, 707 F.2d at 1040. This standard does not require a final appealable order, such as the order in *Offshore*. *See Syverson v. IBM*, 472 F.3d 1072, 1079 (9th Cir. 2007) ("[t]o be final for [issue preclusion] purposes, a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291."). Instead, finality in this context simply requires that "'litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.'" *Id.* (quoting *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961)). There is no question that this Court's ruling is "sufficiently firm."[5] The Dismissal Order is far from "tentative" (the Court dismissed the State Law Claims "without leave to amend" (Dismissal Order at 12)), the parties fully briefed the issues decided by the Court, and the Court "supported its decision with a reasoned opinion." That is all that is required for issue preclusion. *See, e.g.*, *UCP Int'l Co. Ltd. v. Balsam Brands Inc.*, 2017 WL 5068568, at *4 (N.D. Cal. Nov. 3, 2017) ("That the [] Order cannot now be appealed is not sufficient to counterbalance the factors that weigh in favor of collateral estoppel."). Whether applying *Offshore* or the "sufficiently firm" test, the Dismissal Order is final.[6]

**C. O'Connor's Attempt To Manufacture A Lack Of Privity With Plaintiffs Fails.**

O'Connor does not and cannot dispute that he is in privity with the Plaintiffs as to the California Corporations Code claims that he asserts derivatively on Facebook's behalf. Opp. at 10. As he admits,

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[5] Courts in the Ninth Circuit consider four factors in determining whether a prior adjudication is "sufficiently firm": (1) "the decision was [not] avowedly tentative"; (2) "the parties were fully heard;" (3) "the court supported its decision with a reasoned opinion"; and (4) "the decision was subject to appeal or was in fact reviewed on appeal." *Luben Indus.*, 707 F.2d at 1040 (quoting Restatement (Second) of Judgments § 13, comment g (1982)).

[6] The cases that O'Connor relies on for the general principle that appealable final judgments usually require adjudication of all claims on the merits are inapposite because issue preclusion does not require a final appealable order—and, in any event, under *Offshore*, the Dismissal Order *is* a final appealable order even though it was not a decision on the merits. Opp. at 9 (citing *Catlin*, 324 U.S. at 233; *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007); and *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981)).

it is black letter law that plaintiffs asserting derivative claims on behalf of the same corporation are in privity with each other. *See id.*; OB at 7.[7] O'Connor is therefore indisputably bound by this Court's ruling that "under California's internal affairs doctrine, California Corporations Code § 2116, Plaintiffs are barred from bringing [California Corporations Code] claims in a derivative lawsuit when a company's place of incorporation is not California." Dismissal Order at 10. Accordingly, O'Connor is precluded from prosecuting all of the derivative claims he asserts in the State Court Action.

O'Connor tries to escape privity by claiming that he asserts a single "individual" claim challenging the Exclusive Forum Provision. Opp. at 10-11. O'Connor's argument elevates form over substance. O'Connor clearly anticipated that Facebook would assert the Exclusive Forum Provision as a defense to his derivative claims, acknowledging in his Complaint that Facebook had enforced the same provision in this action. *See* Lutz Ex. 1, ¶ 411 ("A judicial determination … is necessary" because "the Forum Provision has been asserted by Facebook … as a defense to similar derivative claims against Individual Defendants under the California Corporations Code arising from the same facts and circumstances as this action"). O'Connor's "individual" claim is a transparent attempt to manufacture an artificial lack of privity with Plaintiffs. This argument fails, however, because ***the entire purpose of O'Connor's declaratory relief claim is to allow O'Connor to bring California Corporations Code claims derivatively.*** Given that "[t]he doctrine of privity … is to be applied with flexibility," *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir. 1987) (citing *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)), the Court should reject O'Connor's ploy to avoid the obvious conclusion that he is in privity with Plaintiffs. *See Adams v. IBM Pers. Pension Plan*, 2008 WL 344699, at *2 (S.D.N.Y. Feb. 5, 2008) (finding privity between separate parties because "[t]o find otherwise would be to elevate form over substance in a manner inconsistent with the underlying goals of res judicata").

[7] The cases cited by O'Connor (*Arduini v. Hart*, 774 F.3d 622 (9th Cir. 2014); *In re Sonus Networks, Inc, S'holder Deriv. Litig.*, 499 F.3d 47 (1st Cir. 2007); and *Goldman v. Northrop Corp.*, 603 F.2d 106 (9th Cir. 1979)) all make clear that derivative plaintiffs are in privity with each other. *None* of these cases permit a derivative plaintiff to escape privity by asserting a purported individual claim regarding an issue that is part and parcel of the derivative claims, as O'Connor tries to do here.

**D. The Court Should Enjoin O'Connor's Relitigation Of The Dismissal Order.**

O'Connor does not contest that the standard for establishing irreparable harm "is usually met … where"—as here—"there is a likelihood of costly and judicially wasteful relitigation of claims and issues that were already adjudicated in federal court." OB at 7 (quoting *Trs. of IL WU-PMA Pension Plan v. Peters*, 660 F. Supp. 2d 1118, 1145 (N.D. Cal. 2009)). O'Connor nevertheless argues this standard is not met here because Facebook will only need to "litigat[e] a single motion" in state court. Opp. at 11. O'Connor's argument ignores what would happen if the state court were to disagree with this Court's Dismissal Order, as O'Connor obviously hopes it will. If that were to occur, Facebook and the individual defendants will be forced to litigate parallel state court derivative suits at great expense instead of having all state law claims consolidated in a single proceeding in Delaware, as the Exclusive Forum Provision was designed to require.[8]

Finally, O'Connor is wrong that Facebook's motion presents a "close case[]." Opp. at 12. The State Court Action is a derivative action purportedly brought on behalf of Facebook arising out of the same set of facts as the Federal Action, and asserts the same type of state law statutory claims that this Court dismissed pursuant to the Exclusive Forum Provision. Absent an injunction, the state court would have to decide the same Exclusive Forum Provision issues already decided by this Court.[9] This is precisely the situation for which the relitigation exception was designed. The Court should exercise its discretion and stop O'Connor's wasteful relitigation of the Dismissal Order.

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[8] The case law also does not support O'Connor's argument. In *County of Sacramento v. Henrikson*, 2017 WL 1207884, at *5 (E.D. Cal. Feb. 3, 2017), the court held that merely relitigating the scope of a stipulation constituted "costly and judicially wasteful relitigation of claims and issues" sufficient to warrant an injunction. Because far more is at stake here, Facebook easily establishes irreparable harm. And O'Connor's suggestion that relitigation of issues only constitutes irreparable harm in interpleader actions is wrong. Opp. at 11. Courts routinely enjoin relitigation using the irreparable harm standard invoked by Facebook outside of the interpleader context. *See, e.g.*, *Henrikson*, 2017 WL 1207884, at *5; *PNY Techs., Inc. v. Miller, Kaplan, Arase & Co., LLP*, 2017 WL 2876736, at *5-6 (N.D. Cal. July 6, 2017); *Chevron U.S.A., Inc. v. Sheikhpour*, 2011 WL 13183009, at *6 n.5 (C.D. Cal. Apr. 11, 2011).

[9] Contrary to O'Connor's argument (Opp. at 11 n.2), the burden of religitation imposed on state courts also constitutes irreparable harm. *See Golden v. Pac. Mar. Ass'n.*, 1984 WL 8145, at *6 (C.D. Cal. May 21, 1984).

## III. CONCLUSION

For the foregoing reasons, and the reasons stated in Facebook's Opening Brief, the Court should grant Facebook's motion and enter an order enjoining the State Court Action from proceeding.

Dated: October 15, 2019

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